Filed 1/31/19 In re M.P. CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re M.P., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. M.P., Defendant and Appellant.	F076900 (Super. Ct. No. JJD069608) **OPINION**

APPEAL from an order of the Superior Court of Tulare County. Robert Anthony Fultz, Judge.

Linda K. Harvie, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Daniel B. Bernstein and Alice Su, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant M.P. appeals from a dispositional order issued pursuant to Welfare and Institutions Code sections 602 and 725[1] after the juvenile court found he had evaded a police officer, driven under the influence of alcohol, and was an unlicensed driver, all misdemeanors. M.P. was placed on probation, a condition of which required that he submit to searches of his electronic devices to ensure he did not associate with certain specified coparticipants in a previous matter. On appeal, he challenges the true finding of evading a police officer and the electronics search condition of his probation. The People move to dismiss the appeal for lack of jurisdiction based on technical deficiencies in the notice of appeal.

We conclude we have jurisdiction over the appeal and deny the People's motion. We find the evidence insufficient to support the true finding on evading a police officer and therefore strike this finding. We also find the electronics search condition unconstitutionally overbroad. Accordingly, we strike this condition and remand for modification. We otherwise affirm.

PROCEDURAL HISTORY

Prior to the events at issue in this appeal, M.P. was the subject of several petitions alleging he came within the provisions of section 602, subdivision (a). The first petition alleged M.P. committed the offenses of unlawful driving or taking a vehicle (Veh. Code, § 10851, subd. (a)) and receiving stolen property (Pen. Code, § 496d, subd. (a)). M.P. admitted both allegations contingent on his acceptance into the deferred entry of judgment ("DEJ") program, into which he was accepted.

While the deferral for the first petition was pending, the People filed a second petition, this time alleging M.P. committed the offense of public intoxication. (Pen. Code, § 647, subd. (f).) As a result, the court detained M.P. and terminated his DEJ program. M.P. later admitted to an infraction (Pen. Code, § 19.8) and was released on

[1] Undesignated statutory references are to the Welfare and Institutions Code.

electronic monitoring. Subsequently, the court declared the two allegations in the first petition to be felonies, declared the minor a ward, placed him at home, and imposed conditions of probation. Relevant here, the court imposed a probation condition requiring M.P. to avoid contact "in person, in writing, by telephone or electronic means" with co-participants to those offenses, G.B., A.S.M., and J.P. The court also required M.P. to submit to search of "any object under his/her control, including any electronic devices, at any time, day or night, with or without a search warrant, with or without his/her consent, by any Peace Officer or Probation Officer."

Thereafter, the People filed the petition at issue in the instant case, alleging a felony violation of unlawful driving or taking of a vehicle (Veh. Code, § 10851, subd. (a); count 1); a misdemeanor violation of evading a police officer (Veh. Code, § 2800.1, subd. (a); count 2); a misdemeanor violation of driving under the influence of alcohol (Veh. Code, § 23152, subd. (a); count 3); a misdemeanor violation of being an unlicensed driver (Veh. Code, § 12500, subd. (a); count 4); and an infraction for being a minor and driving with a blood alcohol level of 0.05 percent (Veh. Code, § 23140, subd. (a); count 5).

The matter was set for a contested hearing. During the pendency of the petition, minor admitted a violation of his probation.

Following testimony and arguments at the contested hearing, the court dismissed count 1 and found counts 2 through 5 of the petition true. The court subsequently dismissed count 5 on the People's motion.

Terms and conditions of probation were imposed and the minor was placed with his parents. Probation recommended and the court imposed a probation term that read: "The minor shall submit to a search of his/her electronic devices to ensure: He does not associate with co-participants in previous matter," then listed those co-participants as G.B., A.S.M., and J.P. The court also ordered that all prior terms and conditions of

probation remained in full force and effect. As stated, the prior terms included a prohibition against association with G.B., A.S.M., and J.P.

FACTUAL BACKGROUND

The facts underlying the instant petition were presented primarily through the testimony of Officer Gabriel Correa at the jurisdictional hearing.

Officer Correa testified that he was on duty on May 7, 2017 at 3:40 a.m. when he observed a silver BMW that appeared to be making a very slow turn.[2] He then observed a gold Toyota make the same turn very rapidly. The BMW then sped up as though it was trying to get away from the Toyota. The Toyota pulled alongside the BMW and it appeared they were racing. Officer Correa followed the vehicles and observed them fail to stop at a posted stop sign. The BMW pulled to the side of the roadway and the driver exited the vehicle. The Toyota skidded to a stop. The driver of the BMW, who Officer Correa later identified as M.P., put his hands up "in a manner like, 'What are you doing,' and he was facing towards the Toyota." M.P. seemed scared.

At that point, Officer Correa activated his emergency lights. M.P. reentered the BMW and drove away. The occupants of the Toyota reentered their vehicle and began to follow him. Officer Correa activated his patrol siren. Officer Correa initiated pursuit and observed both vehicles reach high speeds in a residential area. He estimated the vehicles were traveling at 40 to 60 miles per hour in an area with a 25-miles-per-hour speed limit. The vehicles turned down a cul-de-sac. The BMW pulled into a driveway at the end of the cul-de-sac and the Toyota stopped in the middle of the end of the cul-de-sac.

Officer Correa exited his patrol vehicle with his firearm drawn and ordered all of the occupants of both vehicles to put their hands up. The occupants of the Toyota complied; the occupants of the BMW did not. Assisting officers began to arrive on scene

[2] Officer Correa was wearing an approved uniform consisting of Exeter police patches on both sides, a badge, and a duty belt.

and secured the occupants of the Toyota. They then walked up to the BMW and ordered the occupants out. M.P. and a female juvenile exited the vehicle.

Officer Correa smelled an odor of alcohol emanating from M.P. and, while another officer was conducting a horizontal gaze nystagmus test on M.P., Officer Correa observed signs that M.P. was intoxicated. During the stop, Officer Correa spoke with M.P.'s grandmother by phone to determine whether she permitted M.P. to have her vehicle. She informed Officer Correa that she did not, but she did not want to press charges. At the time, she sounded very "slumberful."

Officer Correa transported M.P. to the Exeter Police Department, where he administered a preliminary alcohol screen device test. The result of the test was a blood alcohol level of 0.05 percent. Officer Correa also learned that M.P. did not have a California driver's license.

M.P.'s grandmother testified that she never told police M.P. couldn't have her vehicle. She could not remember whether she gave M.P. permission to drive her vehicle, but stated it was possible she had done so. She did not have a problem with M.P. taking her car.

DISCUSSION

I. The People's Motion to Dismiss

The People move to dismiss the appeal for lack of jurisdiction because M.P.'s notice of appeal identified the nonappealable "findings made at the jurisdictional hearing, which concluded on 10/19/17," as the appealable order.[3] There is no dispute that an

[3] The People also argue the notice of appeal was untimely. A notice of appeal must be filed within 60 days of the judgment or order being appealed. (Cal. Rules of Court, rule 8.406(a)(1), (c).) Here, the dispositional order was entered on November 16, 2017. The notice of appeal was due 60 days later, on January 15, 2018. (Cal. Rules of Court, rule 1.10(a).) That date, however, fell on a holiday. Accordingly, the notice of appeal was due the following day, January 16, 2018 (Cal. Rules of Court, rule 1.10(b)), and was timely filed on that date.

order made at the jurisdictional hearing does not independently constitute an appealable order. Nonetheless, as we explain, we conclude the notice of appeal is sufficient to confer appellate jurisdiction.

The primary purpose of the jurisdictional hearing in a delinquency proceeding is to determine whether sufficient evidence exists to declare the minor a ward of the juvenile court. (§§ 602, 701, 702; Cal. Rules of Court, rule 5.780(a); *In re P.A.* (2012) 211 Cal.App.4th 23, 31 (*P.A.*).) If the court finds the minor is a person described in section 602, the court then proceeds to hold a dispositional hearing. (§ 702; Cal. Rules of Court, rule 5.780(f).) "Significantly, the jurisdictional order is an intermediate, nonappealable order." (*P.A.*, *supra*, at p. 32.) However, any errors that arise in the jurisdictional phase of a case are reviewable on appeal from the dispositional order. (See *ibid.*)

"The notice of appeal must be liberally construed, and is sufficient if it identifies the particular judgment or order being appealed." (Cal. Rules of Court, rule 8.405(a)(3).) The policy of liberal construction "is especially vital where the faulty notice of appeal engenders no prejudice and causes no confusion concerning the scope of the appeal." (*Norco Delivery Service, Inc. v. Owens Corning Fiberglas, Inc.* (1998) 64 Cal.App.4th 955, 960-961; see *In re Joshua S.* (2007) 41 Cal.4th 261, 272.) In light of the principle that a notice of appeal must be liberally construed, courts have held that "a notice purporting to appeal from jurisdictional findings will be deemed to refer to the subsequent dispositional order, assuming there is one." (*In re Bettye K.* (1991) 234 Cal.App.3d 143, 147, fn. 3 (*Bettye K.*); see also *In re Jennifer V.* (1988) 197 Cal.App.3d 1206, 1208-1209 (*Jennifer V.*) [construing notice of appeal from nonappealable jurisdictional order in dependency case to be from appealable dispositional order].)

Here, the court conducted a jurisdictional hearing on October 19, 2017, and therein found counts 2 through 5 true. At the November 16, 2017 dispositional hearing,

the court declared M.P. a ward of the court and placed him on probation. The first page of M.P.'s notice of appeal identified the October 19, 2017, "jurisdictional hearing" as the order being appealed from. However, the second page of the notice of appeal identified the order appealed from as one made under section 725,[4] with review of section 602 jurisdictional findings. This section of the notice of appeal referred again to the October 19, 2017 hearing.

On these facts, we reject the People's argument that we lack jurisdiction to consider this appeal. Construing the notice of appeal liberally, M.P.'s reference to section 725 is sufficient to identify an appealable dispositional order as the order being appealed from, notwithstanding other references to section 602 or the jurisdictional hearing. Furthermore, the reference to the section 725 dispositional order eliminated any potential for prejudice or confusion on the part of the People, and the People do not contend they were prejudiced or confused. We are unpersuaded by the People's reliance on *In re Shaun R.* (2010) 188 Cal.App.4th 1129, 1138-1139, which involved appeal of conditions imposed by prior dispositional orders that were final, nonappealable, and not identified in the notice of appeal. Finally, we are mindful that a notice purporting to appeal from a jurisdictional order is generally deemed to refer to the subsequent dispositional order where, as here, a dispositional order has issued. (*Bettye K., supra*, 234 Cal.App.3d at p. 147, fn. 3; *Jennifer V., supra*, 197 Cal.App.3d at pp. 1208-1209.)

For these reasons, we will deny the People's motion to dismiss.

II. Evidence that Officer Correa's Vehicle was Distinctly Marked

M.P. challenges the sufficiency of the evidence to support the true finding on the allegation of evading a police officer on the ground there was no evidence to suggest the pursuing officer's vehicle was distinctly marked, as required under Vehicle Code section

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[4] Section 725 governs disposition of a minor following a finding that the minor is a person described in section 601 or 602. (§ 725.)

2800.1, subdivision (a). The People concede no direct evidence was presented on this point but argue the trier of fact could infer the vehicle was distinctly marked based on officer testimony that it was a "patrol vehicle," and based on argument by M.P.'s counsel suggesting M.P. was aware he was being pursued by police. We find the evidence insufficient and conclude the true finding must be reversed.

We apply the substantial evidence standard to a challenge to the sufficiency of evidence to support a juvenile wardship. (See *In re Ryan N.* (2001) 92 Cal.App.4th 1359, 1371.) "An appellate court must review the whole record in the light most favorable to the judgment in order to determine whether it discloses substantial evidence that a reasonable trier of fact could find the essential elements of the crime beyond a reasonable doubt." (*In re Ricky T.* (2001) 87 Cal.App.4th 1132, 1136 (*Ricky T.*).)

Vehicle Code section 2800.1, subdivision (a) provides:

> "Any person who, while operating a motor vehicle and with the intent to evade, willfully flees or otherwise attempts to elude a pursuing peace officer's motor vehicle, is guilty of a misdemeanor punishable by imprisonment in a county jail for not more than one year if all of the following conditions exist:
>
> (1) The peace officer's motor vehicle is exhibiting at least one lighted red lamp visible from the front and the person either sees or reasonably should have seen the lamp.
>
> (2) The peace officer's motor vehicle is sounding a siren as may be reasonably necessary.
>
> (3) The peace officer's motor vehicle is distinctively marked.
>
> (4) The peace officer's motor vehicle is operated by a peace officer, as defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2 of the Penal Code, and that peace officer is wearing a distinctive uniform." (Veh. Code, § 2800.1, subd. (a).)

"The statutory requirement that the pursuing peace officer's vehicle be distinctively marked is an element of the offense of evading a pursuing peace officer's vehicle." (*People v. Hudson* (2006) 38 Cal.4th 1002, 1013 (*Hudson*).) Whether a vehicle

is distinctly marked turns on evidence of "the vehicle itself," and not on "circumstances that have no relationship whatsoever to the vehicle's appearance." (*Id.* at p. 1009.) Accordingly, a defendant's awareness that he was being pursued by police, the fact that an officer is wearing a uniform, and a defendant's consciousness of guilt, do not support a conclusion that a vehicle is distinctly marked. (*Id.* at pp. 1009-1010.) Furthermore, evidence of the vehicle bearing a red lamp and sounding a siren is insufficient to satisfy the statutory requirement that the vehicle be distinctly marked. (*Id.* at p. 1010.) "Thus, for purposes of section 2800.1, a pursuing peace officer's vehicle is 'distinctively marked' if its outward appearance during the pursuit exhibits, *in addition to* a red light and a siren, one or more features that are reasonably visible to other drivers and distinguish it from vehicles not used for law enforcement so as to give reasonable notice to the fleeing motorist that the pursuit is by the police." (*Id.* at pp. 1010-1011, fn. omitted.)

Other than testimony regarding Officer Correa's activation of lights and a siren, no evidence was presented regarding any markings on his vehicle.[5] Nonetheless, the People argue the court, as trier of fact, could infer the vehicle was distinctively marked because Officer Correa testified he was "on duty" and in his "patrol vehicle." According to the People, "[i]n the absence of contrary evidence, the court inescapably would have inferred that Officer Correa was driving a standard police car bearing distinctive markings."

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[5] In closing argument, the prosecutor acknowledged, "I believe it's true I forgot to specifically ask whether the police car was marked in this case. However, I think the Court has enough evidence to find that the car was distinctively marked because the officer testified that he was in full uniform and that he was on patrol. There's no reason why a uniformed officer would be driving an unmarked vehicle. But even if the Court finds for whatever reason that there's not enough evidence here, the People have at least proven the 148 as to that count, because the minor did essentially resist arrest – resist detention when he drove off." On appeal, the People do not suggest M.P. violated Penal Code section 148 by resisting an officer, and we therefore do not consider this argument.

We begin by stating what should be obvious. M.P. was not required to present "contrary evidence" to suggest Officer Correa's vehicle was *not* distinctively marked. The burden is on the People to prove each element of the allegation beyond a reasonable doubt. (*Ricky T., supra,* 87 Cal.App.4th at p. 1136.) We cannot find sufficient evidence to support an allegation based solely on the lack of contrary evidence.

As for the People's contention that evidence Officer Correa drove a "patrol vehicle" establishes the inescapable inference the vehicle was distinctively marked, we find instructive the case of *People v. Byrd* (2016) 1 Cal.App.5th 1219 (*Byrd*). There, the Third District Court of Appeal considered whether sufficient evidence was presented to establish the pursuing officers were wearing distinctive uniforms, as required under Vehicle Code section 2800.1, subdivision (a)(4). (*Byrd, supra,* at pp. 1222-1226.) There was a "complete lack of evidence regarding the officers' attire" during the relevant period, but "[t]he officers were on patrol in a fully marked traditional black and white police car, and the car's siren and emergency overhead red and blue lights were activated during the pursuit of defendant." (*Id.* at pp. 1224, 1226.) Additionally, the defendant admitted at trial that he saw the patrol car and made a conscious decision to flee from the police. (*Id.* at p. 1224.)

The court nonetheless concluded the evidence was insufficient to support the conviction, stating, "The fact that the officers were assigned to the patrol unit and were in a patrol car at the time of the pursuit is not sufficient to prove that either officer was wearing a police uniform or other distinctive police attire. To infer evidence of a distinctive uniform rather than plainclothes or another less than distinctive outfit from the evidence in the record before us would be pure speculation." (*Byrd, supra,* 1 Cal.App.5th at 1224.) The court therefore rejected the People's argument "that the proof supporting the unrelated elements of evading was sufficient to support the element requiring them to prove at least one of the officers wore a distinctive uniform." (*Id.* at p. 1225.) Although

the court acknowledged this holding "may seem bewildering to some," it concluded any remedy must lie with the Legislature. (*Ibid.*)

Just as evidence that an officer was on patrol is insufficient to establish he was wearing a distinctive uniform, so evidence that an officer was on patrol is insufficient to establish his vehicle was distinctly marked. To infer from the record before us that Officer Correa's patrol vehicle bore distinctive markings or features beyond lights and a siren that would distinguish it from vehicles not used for law enforcement would be an exercise in pure speculation. Nothing in the evidence suggests such an inference is proper, let alone "inescapable," as the People claim.

We also reject the People's contention that arguments of defense counsel "buttressed" this evidence, or amounted to a concession that the vehicle was distinctively marked. As an initial matter, it would strain credulity to conclude defense counsel conceded this issue, given that it was defense counsel who pointed out, during closing argument, that the prosecutor failed to present any evidence of this element. Furthermore, as the People acknowledge, counsel's arguments are not evidence and are therefore not determinative of whether sufficient evidence supports the judgment. Finally, defense counsel's argument suggests only that M.P. was aware he was being pursued by police. However, our Supreme Court has determined that such awareness is irrelevant to the determination of whether substantial evidence supports a finding that a vehicle was distinctively marked. (*Hudson, supra,* 38 Cal.4th at pp. 1009-1010.)

We therefore conclude the evidence is insufficient to support the true finding on the allegation of evading a police officer. We note that, as in *Byrd*, this somewhat "bewildering" result likely could have been avoided through an exercise of greater diligence on the part of the prosecutor. (See *Byrd, supra,* 1 Cal.App.5th at pp. 1225, 1226, fn. 4.) The Legislature has set out the elements of the offense, and it is the prosecutor's burden to prove those elements beyond a reasonable doubt. In the absence of any evidence to support this element, we are compelled to strike the true finding. In

light of this holding, we need not, and do not, address M.P.'s argument that he lacked the requisite intent to violate Vehicle Code section 2800.1.

III. Electronics Search Condition

M.P. contends the electronics search condition of his probation, requiring him to submit to a search of his electronic devices to ensure he does not associate with former co-participants G.B., A.S.M., and J.P, is unconstitutionally overbroad, unconstitutionally vague, and unreasonable under *People v. Lent* (1975) 15 Cal.3d 481 (*Lent*).[6] Although we conclude the condition is valid under *Lent*, we nonetheless conclude it is overbroad

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[6] There is no consensus regarding the validity of electronics search conditions and the issues presented here are presently pending before our Supreme Court. (E.g., *In re Juan R.* (2018) 22 Cal.App.5th 1083 [upholding condition], review granted July 25, 2018, S249256; *People v. Acosta* (2018) 20 Cal.App.5th 225 [upholding condition], review granted Apr. 25, 2018, S247656; *People v. Valdivia* (2017) 16 Cal.App.5th 1130 [finding condition overbroad and remanding for modification], review granted Feb. 14, 2018, S245893; *People v. Trujillo* (2017) 15 Cal.App.5th 574 (*Trujillo*) [upholding condition], review granted Nov. 29, 2017, S244650; *In re R.S.* (2017) 11 Cal.App.5th 239 [finding challenge to condition forfeited], review granted July 26, 2017, S242387; *People v. Bryant* (2017) 10 Cal.App.5th 396 [striking condition under *Lent*], review granted June 28, 2017, S241937; *In re Q.R.* (2017) 7 Cal.App.5th 1231 [upholding condition], review granted Apr. 12, 2017, S240222; *People v. Nachbar* (2016) 3 Cal.App.5th 1122 [upholding condition], review granted Dec. 14, 2016, S238210; *In re J.E.* (2016) 1 Cal.App.5th 795 [upholding condition], review granted Oct. 12, 2016, S236628; *In re P.O.* (2016) 246 Cal.App.4th 288 (*P.O.*) [finding condition unconstitutionally overbroad and modifying condition]; *In re A.S.* (2016) 245 Cal.App.4th 758 [upholding condition], review granted and opn. ordered nonpub. May 25, 2016, S233932; *People v. Appleton* (2016) 245 Cal.App.4th 717 (*Appleton*) [finding condition overbroad and remanding for modification]; *In re Mark C.* (2016) 244 Cal.App.4th 520 [striking condition under *Lent*], review granted and opn. ordered nonpub. Apr. 13, 2016, S232849; *In re Patrick F.* (2015) 242 Cal.App.4th 104 [finding condition overbroad and modifying condition], review granted and opn. ordered nonpub. Feb. 17, 2016, S231428; *In re Ricardo P.* (2015) 241 Cal.App.4th 676 [finding condition overbroad and remanding for modification], review granted and opn. ordered nonpub. Feb. 17, 2016, S230923; *In re Erica R.* (2015) 240 Cal.App.4th 907 (*Erica R.*) [invalidating condition under *Lent*].) Absent further guidance from our Supreme Court, we resort to our own construction of applicable law.

and must be stricken on that basis. We will remand for the juvenile court to more narrowly tailor the condition, if it chooses.

A. Reasonableness Under *Lent*

As an initial matter, the People contend M.P. forfeited his challenge to the electronics search condition of his probation by failing to object in the juvenile court. Failure to timely challenge a probation condition on *Lent* grounds in the juvenile court waives the claim on appeal. (*People v. Welch* (1993) 5 Cal.4th 228, 237.) Regardless, we conclude the electronics search condition is valid under *Lent* because it is reasonably related to future criminality.

When a minor is made a ward of the juvenile court and placed on probation, the court "may impose and require any and all reasonable conditions that it may determine fitting and proper to the end that justice may be done and the reformation and rehabilitation of the ward enhanced." (§ 730, subd. (b).) " 'In fashioning the conditions of probation, the juvenile court should consider the minor's entire social history in addition to the circumstances of the crime. [Citation.] Thus, "[a] condition of probation which is [legally] impermissible for an adult criminal defendant is not necessarily unreasonable for a juvenile receiving guidance and supervision from the juvenile court." ' " (*In re R.V.* (2009) 171 Cal.App.4th 239, 246.) The court has "broad discretion to fashion conditions of probation," (*In re Josh W.* (1997) 55 Cal.App.4th 1, 5 (*Josh W.*)), although "every juvenile probation condition must be made to fit the circumstances and the minor" (*In re Binh L.* (1992) 5 Cal.App.4th 194, 203).

Although a juvenile court's discretion to impose probation conditions is broad, it is not unlimited. (*In re D.G.* (2010) 187 Cal.App.4th 47, 52 (*D.G.*).) Under *Lent*, which applies to both juvenile and adult probationers, a condition is invalid if it " '(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality.' " (*Lent, supra,* 15 Cal.3d at p. 486; *Josh W., supra,*

55 Cal.App.4th at pp. 5-6.) "This test is conjunctive – all three prongs must be satisfied before a reviewing court will invalidate a probation term." (*People v. Olguin* (2008) 45 Cal.4th 375, 379.) We review the reasonableness of the court's imposition of a probation condition for an abuse of discretion, taking into account the court's stated purpose in imposing it. (*Appleton, supra,* 245 Cal.App.4th at p. 723.)

The People concede the first and second prongs of *Lent* are met here. Electronic devices played no role in M.P.'s offenses and the use or possession of such devices is not itself criminal. However, as stated, the *Lent* test is conjunctive. (*Olguin, supra,* 45 Cal.4th at p. 379.) "As such, even if a condition of probation has no relationship to the crime of which a defendant was convicted and involves conduct that is not itself criminal, the condition is valid as long as the condition is reasonably related to preventing future criminality." (*Id.* at pp. 379-380.) Our analysis of the reasonableness of M.P.'s electronics search condition therefore turns on this third prong. (See *Lent, supra,* 15 Cal.3d at p. 486.) The Courts of Appeal are divided on the application of the third prong of *Lent* to electronics search conditions, particularly where the underlying offense did not involve the use of electronic devices. We contrast the approach taken by the court in *Erica R., supra,* 240 Cal.App.4th 907, with that taken in *Trujillo, supra,* 15 Cal.App.5th 574.

In *Erica R.,* the court held there must be an individualized connection between the juvenile's history and the terms of probation. The court therefore invalidated an electronics search condition imposed on a juvenile who committed the offense of possession of Ecstasy. (*Erica R., supra,* 240 Cal.App.4th at p. 912.) The juvenile court noted that many juveniles involved with drugs "tend to post information about themselves and drug usage." (*Id.* at p. 913.) However, the Court of Appeal noted nothing in the juvenile's history demonstrated a predisposition to utilize electronic devices in connection with criminal activity, and the court thus found the electronics search condition unrelated to preventing future criminality. (*Ibid.*; cf. *In re Malik J.*

(2015) 240 Cal.App.4th 896, 903-904 [upholding electronics search condition under *Lent* because minor had a history of robbing people of their cell phones and the condition enabled law enforcement to determine whether a phone in minor's possession had been stolen].) The court noted this individualized connection is particularly necessary in the context of juvenile, as opposed to adult, probation:

> " ' "[J]uvenile probation is not, as with an adult, an act of leniency in lieu of statutory punishment; it is an ingredient of a final order for the minor's reformation and rehabilitation." ' [Citation.] A juvenile 'cannot refuse probation [citations] and therefore is in no position to refuse a particular condition of probation.' [Citation.] Courts have recognized that a 'minor cannot be made subject to an automatic search condition; instead, such condition must be tailored to fit the circumstances of the case and the minor.' " (*Erica R., supra*, 240 Cal.App.4th at p. 914.)

In contrast, in *Trujillo,*[7] the court rejected the notion that the lack of connection between an electronic device and the probationer's offenses renders an electronics search condition unreasonable as a matter of law: "Because the probation officer is responsible for ensuring the probationer refrains from criminal activity and obeys all laws during the probationary period, the court may appropriately impose conditions intended to aid the probation officer in supervising the probationer and promoting his or her rehabilitation. [Citations.] 'This is true "even if [the] condition ... has no relationship to the crime of which a defendant was convicted." ' " (*Trujillo, supra*, 15 Cal.App.5th at p. 583.)

Our Supreme Court has held that "[a] condition of probation that enables a probation officer to supervise his or her charges effectively is … 'reasonably related to future criminality.' " (*Olguin, supra*, 45 Cal.4th at pp. 380-381.) Pending further guidance from our Supreme Court, we take our Supreme Court at its word and conclude, like *Trujillo*, that a probation condition relating to supervision may be reasonable, even if not strictly related to any underlying offense. Moreover, here, the probation condition

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[7] Although our Supreme Court granted review in *Trujillo*, we may cite the decision for its persuasive value. (Cal. Rules of Court, rule 8.1115(e)(1).)

adequately fit the circumstances and the minor. The court's stated purpose in imposing the electronics search condition was to ensure M.P. did not communicate with three former co-participants. Another condition of his probation prevented him from associating with these former co-participants. The electronics search condition therefore permitted M.P.'s probation officer to determine whether M.P. was complying with other terms of his probation, and to ensure he was not associating with individuals with whom he had previously committed an offense. Notably, M.P. previously had performed poorly on supervision. We therefore conclude the condition is reasonably related to future criminality under *Lent* and *Olguin*, and adequately tailored to the circumstances of M.P. The trial court did not abuse its discretion in imposing it.

B. Constitutional Concerns

1. Forfeiture

The People argue M.P.'s claims of vagueness and constitutional overbreadth are forfeited on appeal by his failure to object below. The applicable forfeiture rule is set out in *In re Sheena K.* (2007) 40 Cal.4th 875 (*Sheena K.*).

"[A]n appellate claim – amounting to a 'facial challenge' – that phrasing or language of a probation condition is unconstitutionally vague and overbroad because, for example, of the absence of a requirement of knowledge … does not require scrutiny of individual facts and circumstances but instead requires the review of abstract and generalized legal concepts – a task that is well suited to the role of an appellate court. Consideration and possible modification of a challenged condition of probation, undertaken by the appellate court, may save the time and government resources that otherwise would be expended in attempting to enforce a condition that is invalid as a matter of law." (*Sheena K.*, *supra*, 40 Cal.4th at p. 885.) "[A] challenge to a term of probation on the ground of unconstitutional vagueness or overbreadth that is capable of correction without reference to the particular sentencing record developed in the trial court *can* be said to present a pure question of law." (*Id.* at p. 887.) However, this rule

"does not apply in every case in which a probation condition is challenged on a constitutional ground," and not " 'all constitutional defects in conditions of probation may be raised for the first time on appeal, since there may be circumstances that do not present "pure questions of law that can be resolved without reference to the particular sentencing record developed in the trial court." ' " (*Id.* at p. 889.) Regardless, "'an appellate court may review a forfeited claim – and '[w]hether or not it should do so is entrusted to its discretion.' " (*Id.* at p. 887, fn. 7.)

Here, the stated purpose of the probation condition was to ensure M.P. did not associate with individuals with whom he previously committed an offense. Our task in evaluating the condition is to determine whether it is narrowly tailored to this purpose and M.P.'s needs. (*P.O., supra*, 246 Cal.App.4th at p. 297.) Because the court clearly articulated the purpose of the condition, a more detailed review of the sentencing record is not necessary. Thus, we will exercise our discretion to review M.P.'s challenge to this condition.

2. Overbreadth

Judicial discretion to set conditions of probation is circumscribed by constitutional considerations. (*People v. O'Neil* (2008) 165 Cal.App.4th 1351, 1356.) We review constitutional challenges to probation conditions de novo. (*Appleton, supra*, 245 Cal.App.4th at p. 723.)

"A probation condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad." (*Sheena K., supra,* 40 Cal.4th at p. 890.) "The essential question in an overbreadth challenge is the closeness of the fit between the legitimate purpose of the restriction and the burden it imposes on the defendant's constitutional rights – bearing in mind, of course, that perfection in such matters is impossible, and that practical necessity will justify some infringement." (*In re E.O.* (2010) 188 Cal.App.4th 1149, 1153 (*E.O.*).)

"A probation condition imposed on a minor must be narrowly tailored to both the condition's purposes and the minor's needs but ' " ' "a condition ... that would be unconstitutional or otherwise improper for an adult probationer may be permissible for a minor under the supervision of the juvenile court." ' " ' " (*P.O., supra,* 246 Cal.App.4th at p. 297.) Conditions which infringe on constitutional rights may be upheld as long as they are tailored to meet the needs of the juvenile. (*In re Tyrell J.* (1994) 8 Cal.4th 68, 82, disapproved on other grounds in *In re Jaime P.* (2006) 40 Cal.4th 128, 130; see *D.G., supra,* 187 Cal.App.4th at p. 52.)

The electronics search condition at issue here clearly implicates M.P.'s constitutional rights. "It is well established that individuals retain a constitutionally protected expectation of privacy in the contents of their computers." (*Appleton, supra,* 245 Cal.App.4th at p. 724.) The United States Supreme Court has also extended Fourth Amendment protections to cell phones. (*Riley v. California* (2014) __ U.S. __, 134 S.Ct. 2473 (*Riley*).) "Much of the reasoning in *Riley* – which recognized how the immense storage capacity of modern cell phones allows users to carry large volumes of data – would apply to other modern electronic devices covered by the probation condition at issue here." (*Appleton, supra,* at p. 724.)

While some infringement of M.P.'s rights is justified in the context presented here, we conclude the electronics search condition sweeps too broadly in light of the legitimate purpose it is designed to serve. The condition is not narrowly tailored for the purposes of public safety and rehabilitation and is not narrowly tailored to [M.P.] in particular. Indeed, it is not tailored at all. While the condition was intended to monitor whether M.P. was complying with a non-association condition of his probation, the juvenile court did not limit the types of data that may be searched. "Mobile application software on a cell phone, or 'apps,' offer a range of tools for managing detailed information about all aspects of a person's life," including financial, medical, romantic, and political. (*Riley, supra,* 134 S.Ct. at p. 2490.) The electronics search condition therefore permits review of

private information that is unlikely to reveal whether M.P. is complying with the non-association condition of his probation.

However, this concern can be remedied by limiting the electronics search authorization to searches of information that is reasonably likely to be relevant to M.P.'s communication or association with his former co-participants, such as text and voicemail messages, photographs, e-mails, and social media accounts. Such a limitation would prohibit searches of data found in applications and websites involving unrelated matters like personal finance or medical care.

The juvenile court is in the best position to determine which types of information must be subject to search to accomplish the condition's purpose. Accordingly, rather than modifying the condition ourselves, we will strike it and remand for the juvenile court to impose a narrower condition if it deems it necessary. (See *People v. Perez* (2009) 176 Cal.App.4th 380, 386.)

3. Vagueness

M.P. contends that the probation condition's reference to "electronic devices" is unconstitutionally vague. "[T]he underpinning of a vagueness challenge is the due process concept of 'fair warning.' " (*Sheena K., supra,* 40 Cal.4th at p. 890.) "A restriction is unconstitutionally vague if it is not ' "sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated." ' " (*E.O., supra,* 188 Cal.App.4th at p. 1153; see *Sheena K., supra,* at p. 890.)

Our determination that the condition is overbroad effectively moots this challenge. Moreover, the subject of the condition, i.e., electronic devices, if combined on remand with an explicit listing of the type of information that may be searched, may be sufficiently specific to provide M.P. the "fair warning" necessary to withstand a vagueness challenge. (See *People v. Maldonado* (2018) 22 Cal.App.5th 138, 145-146, review granted June 20, 2018, S248800.) Furthermore, if M.P. believes a condition

imposed on remand is unconstitutionally vague, he will have the opportunity to object and for the court to explain its reasoning or modify the condition accordingly. Given M.P.'s failure to object on vagueness grounds below and our determination that the condition is overbroad, we decline to address the vagueness challenge at this stage of the proceedings.

DISPOSITION

The true finding on count 2, evading a police officer (Veh. Code, § 2800.1, subd. (a)), is reversed, and it shall be stricken from the jurisdictional and dispositional orders of the juvenile court. The matter is remanded to the juvenile court for modification of the probation condition relating to monitoring of M.P.'s electronic devices. In all other respects, the dispositional order is affirmed.

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SNAUFFER, J.

WE CONCUR:

_____
DETJEN, Acting P.J.

_____
FRANSON, J.